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No. 85-701

IN THE

Supreme Court of the United States

October Term, 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ASSOCIATED PRESS MANAGING EDITORS; NATIONAL ASSOCIATION OF BROADCASTERS; THE NEWSPAPER GUILD; PUBLIC BROADCASTING SERVICE; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI AS *AMICI CURIAE*

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No. 85-701

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v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,

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On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Brief of the Reporters Committee for Freedom of the Press; Associated Press Managing Editors; National Association of Broadcasters; The Newspaper Guild; Public Broadcasting Service; Radio-Television News Directors Association; and the Society of Professional Journalists, Sigma Delta Chi as Amici Curiae

INTEREST OF THE AMICI CURIAE

The news organizations filing this brief are not parties to this action but they have a vital First Amendment interest in the outcome of this litigation.

The Reporters Committee for Freedom of the Press is a voluntary unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

The Associated Press Managing Editors (APME) is a separate membership organization which includes more than 800 editors of newspaper members of The

Associated Press, which gathers news worldwide for dissemination to 1,500 newspapers and 5,700 broadcast stations in the United States.

The National Association of Broadcasters (NAB), organized in 1922, is a nonprofit, incorporated association of radio and television broadcasting stations and networks. NAB membership includes more than 4500 radio stations, 900 television stations, and [illegible] major commercial networks.

The Newspaper Guild is an unincorporated trade union representing some 40,000 employees of newspapers, magazines, wire services and related enterprises in the United States, Canada and Puerto Rico, and has been active in protecting the First Amendment rights of its members and all Americans.

The Public Broadcasting Service

(PBS) is a non-profit, membership corporation, the members of which are licensees of non-commercial, educational television stations. PBS's members produce a significant body of news, public affairs, and documentary programming both for their own local broadcast and for national distribution by PBS. As part of its mission to promote discussion of public issues and events, public television has developed diverse, often experimental program formats in addition to the more conventional forms of television journalism. PBS has a vital interest in insuring that the FEC's rules encourage, in both form and substance, the broadest range of journalistic expression.

The Radio-Television News Directors Association (RTNDA) is a professional organization of more than 2,000 news

directors and others who are active in the supervising, reporting, and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 24,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States.

The amici curiae believe that this case represents an attempt by the Federal Election Commission to exercise jurisdiction over a publication merely because it has published partisan political commentary. Because of their devotion to protecting the First Amendment rights of all publishers,

whether they publish political material or not, each of the amici has a strong interest in the outcome of this litigation.

Amici have requested and received consent to file this brief from appellant and from appellee. Their letters of consent have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

Massachusetts Citizens for Life, Inc. (MCFL) is a non-profit corporation formed primarily to oppose legalized abortion. Since its beginning in 1973, it has published a newsletter on a fairly regular basis. MCFL has also printed special editions in conjunction with major elections to inform voters of the candidates' stands on pro-life issues.

In September 1978, MCFL published its Special Election Edition with tabulations of questionnaire results and voting records on pro-life issues of 442 state and 50 federal candidates. The edition contained photographs of some of the pro-life candidates and urged readers to "vote pro-life." Soon after, MCFL published a supplement to correct

minor errors in the Special Election Edition.

Acting on a complaint, the Federal Election Commission (FEC) began an investigation in May 1979 to determine if MCFL's Special Election Edition was a violation of Section 441b(a) of the Federal Election Campaign Act (FECA), which prohibits "any corporation whatever" from making any contribution or expenditure to any candidate for federal election from its general treasury funds. The FEC initiated an action in March 1982, alleging that the MCFL had violated that provision.

The District Court, in granting summary judgment to MCFL, found that Section 441b(a) did not apply to the Special Election Edition because it was not an expenditure "to any candidate" as defined in Section 441b(b)(2), and

because it was distributed through the facilities of a periodical publication, qualifying it for the news exemption to the statute set out in Section 431(9)(B)(i).

The District Court also held that if Section 441b(a) was meant to apply to the Special Election Edition, it was an unconstitutional abridgement of MCFL's freedoms of speech, press, and association under the First Amendment.

The Court of Appeals found that Section 441b(a) was meant to apply to MCFL's Special Election Edition, but agreed with the District Court that the statute was unconstitutional as applied to a publication by a non-profit idealogical corporation such as MCFL.

The FEC filed this appeal on October 25, 1985. This Court noted probable jurisdiction on January 13, 1986.

SUMMARY OF ARGUMENT

Section 431(9)(A)(i) of the Federal Election Campaign Act (FECA) contains a broad, general definition of "expenditure," which includes the spending of "anything of value . . . for the purpose of influencing" any federal election.

Section 441b, which governs corporate expenditures, includes a narrower definition which requires that the value be given "to" a candidate. Section 431(9)(B)(v) specifically excludes corporations from the broader definition.

Publication by MCFL of the Special Election Edition was not coordinated in any way with any candidate. It was thus not an expenditure "to any candidate," and therefore is not a prohibited

expenditure under Section 441b(a).

The FECA also exempts from the definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any . . . periodical publication." MCFL's regular newsletter is a periodical publication, and the Special Election Edition was distributed through its facilities. Although the election editions themselves, published at regular intervals, are arguably periodical publications, it is not necessary that they be periodical publications to satisfy the statute, but only that they be distributed through the facilities of one.

It is not relevant under the news exemption that the Special Election Edition had a larger circulation than the regular newsletter, nor is it

relevant that its staff differed from the regular newsletter staff.

Special editions more easily qualify as "news, commentary, or editorial" under the news exemption than do the subscription solicitation efforts found to be within the exemption in two district court cases that have addressed the issue.

If Section 441b(a) is found to apply to the Special Election Edition, its application in this case to a non-profit idealogical corporation is a violation of MCFL's First Amendment freedoms of speech, press, and association.

The Special Election Edition, which contained news and commentary on the abortion issue, is political speech, and is therefore entitled to the fullest First Amendment protection. The fact that MCFL is a corporation is not

sufficient to divest it of this protection, for this would deprive its members of their freedom of association. Pooling of resources, in corporate or other form, is a valid way for persons of modest means and similar beliefs to amplify their message to the public.

Although this Court has not decided the constitutionality of restrictions on independent expenditures by corporations, it found in FEC v. National Conservative Political Action Committee (NCPAC), 105 S.Ct. 1459 (1985), that a limitation on expenditures by a political action committee in support of a candidate was unconstitutional because there was no compelling government interest justifying such a regulation. A non-profit, idealogical corporation,

like a PAC, exists primarily to amplify a political message, and its form of organization is not likely to lead to corrupt election practices. As in NCPAC, no showing of a substantial government interest has been made, so this restriction of MCFL's First Amendment rights is unconstitutional.

A finding that Section 441b(a) is unconstitutional as applied to a publication by a non-profit idealogical corporation is consistent with this Court's holding in FEC v. National Right to Work Committee (NRWC), 459 U.S. 197 (1982), which held that the FECA's limitations on solicitation of funds by a corporation for its political committee were valid. Although NRWC's corporate status was an important factor in that case, more important was the fact that the restriction applied to

corporate contributions to candidates, which are of a different constitutional stature than expenditures by a corporation to propagate views on an issue of public interest.

Section 441b(a) is a content-based prior restraint on MCFL's speech, and therefore carries a presumption of invalidity. Such a restraint can only be justified by a showing of a compelling government interest. The existence of an alternative means of expression does not justify the elimination of the most simple one.

The FEC has not shown that the Special Election Edition had any tendency to corrupt elections or cause the appearance of corruption, which is the only compelling government interest recognized by this Court sufficient to justify regulation of campaign finances

and the accompanying infringement on First Amendment rights. Nor has the FEC shown that the publication was in any way inconsistent with the goals of MCFL's contributors.

The standard of review is rigorous when First Amendment freedoms are at issue. The FEC has failed to demonstrate any government interest sufficient to justify a prior restraint on a publication by a non-profit, issue-oriented corporation.

ARGUMENT

I. PUBLICATION OF THE SPECIAL ELECTION EDITION BY MCFL WAS NOT A "CONTRIBUTION OR EXPENDITURE" MADE "TO ANY CANDIDATE . . . IN CONNECTION WITH ANY ELECTION" AS DEFINED IN FECA SECTION 441b(b)(2).

Section 441b(b)(2), of the FECA, in defining the scope of the contributions and expenditures prohibited for corporations under Section 441b(a), states:

> For the purpose of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election . . . (emphasis added).

In contrast, in the FECA's general definitions, Section 431(9)(A)(i) provides that the term "expenditure" includes:

> any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any [federal] election . . . (emphasis added).

However, Section 431 (9)(B)(v) states that the definition of "expenditure" does not include:

> any payment made or obligation incurred by a corporation or labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization . . . .

The Section 431 definition is clearly broader, as it does not require that the expenditure go to a candidate, but only that it have the purpose of influencing the election. Yet Section 431 includes a specific exclusion from

its greater breadth for corporations and labor organizations covered under Section 441b, stating that the definition of "expenditure" for those organizations is no broader than the 441b(b) definition.

The Court of Appeals erroneously interpreted Section 431(9)(B)(v) as providing "only that the definition of 'expenditure' with regard to individual contributions shall be no broader than the definition with regard to corporate contributions" (emphasis added). Section 431(9)(B)(v) clearly addresses expenditures by corporations and unions, and not by individuals. Therefore, it does not equate the general definition of "expenditure" with the Section 441b(b) definition, as interpreted by the Court of Appeals, but instead excepts corporations and unions from the

application of the broader definition.

The fact that the Section 441b(b) definition, like the Section 431(9)(A)(i) general definition, uses the word "include" in defining the scope of the definition does, as the Court of Appeals said, indicate that each definition is non-exclusive. The non-exclusivity, however, applies in each section to the delineation of the types of assistance included within the definition. It does not change the fact that although this list is modified in the general definition by the broad language "for the purpose of influencing an election," it is qualified by the much narrower language "to any candidate" in the definition that applies to corporations and unions.

Massachusetts Citizens for Life (MCFL), as a corporation, is subject to

the 441b(b) definition of expenditure. While the expenses of producing MCFL's Special Election Edition might be seen as being "for the purpose of influencing an election," they were clearly not made "to any candidate," and therefore are not an "expenditures" under Section 441b.

II. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S FINDING THAT THE NEWS EXEMPTION OF THE FECA APPLIES TO MCFL'S SPECIAL ELECTION EDITION.

A. The News Exemption Of The FECA Should Be Broadly Interpreted.

Section 431(9)(B)(i) of the FECA (hereafter the "news exemption") states that the term "expenditure" does not include

> any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

As found by the District Court, the legislative history of the provision indicates that Congress intended it to be interpreted broadly. The House of Representatives committee report stated:

> it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association.

H.R. Rep No. 1239, 93d Cong., 2d Sess 4 (1974).

The District Court also found that the same report indicated that the amendment was intended to conform to pre-existing case law, including this Court's statement:

> It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication. It is unduly stretching language to say that members or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests.

United States v. CIO, 335 U.S. 106, 113 (1948).

B. MCFL's Special Election Edition Falls Within The News Exemption.

At issue in this case are (1) whether or not the Special Election Edition was news, commentary, or editorial, and (2) whether or not it was distributed throught the facilities of a periodical publication. It is not disputed that MCFL's facilities are not owned or controlled by any political party or candidate.

The Special Election Edition clearly included news. MCFL compiled voting records and questionnaire responses to

provide comprehensive data not readily available from other sources. The edition also contained editorial matter and commentary, urging its readers to advance the pro-life cause by supporting candidates who held similar pro-life views.

It is also clear that MCFL's newsletter is a periodical publication. The newsletter has been published since MCFL's founding in 1973, although it has occasionally missed issues due to financial difficulties. The District Court even found that the Special Election Editions themselves were periodical publications for purposes of the statute. This finding was not necessary, as the news exemption requires only that the news and editorial matter be "distributed through the facilities" of a periodical

publication. The Special Election Editions were certainly not, as the Court of Appeals found, published "sporadically" because they were published "only during federal election campaigns." To so argue would suggest that federal elections themselves are sporadic because they are only held in alternate years.

The Court of Appeals held that the Special Election Edition could not be considered to have been published under the facilities of a newsletter, even if the newsletter were found to be a periodical. The court emphasized that the circulation of the Special Election Edition was much larger than that of the regular newsletter. This is not relevant to the statutory requirements for the news exemption, nor are the facts that both the masthead and the

production staff of the Special Election Edition varied from that of the regular newsletter.

Contrary to the Court of Appeals' holding, special editions are normally published by many periodicals. They provide specialized information on various events and subjects of special interest to readers, and often carry larger circulations, different staff members, and variations from the format of the parent publication.

The news exemption has consistently received broad interpretation by courts. For example, the district court for the District of Columbia found that the news exemption applied to a newspaper's distribution of a letter soliciting subscriptions. FEC v. Phillips Publishing Co., 517 F.Supp. 1308, 1313 (D.D.C. 1981). Another

district court found that a tape produced to promote a magazine also fell within this exception. Reader's Digest Association v. FEC, 509 F.Supp. 1210 (S.D.N.Y. 1981). The Special Election Edition more easily qualifies both as a normal press function and as news and editorial matter than either of the previously mentioned examples. A special edition published by a periodical is not only a normal press function, but it is within the scope of the newsgathering and news disseminating part of its operation, which the news exemption is intended to cover.

III. THE COURT OF APPEALS PROPERLY HELD THAT APPLICATION OF SECTION 441b OF THE FEDERAL ELECTION CAMPAIGN ACT TO PREVENT PUBLICATION OF MCFL'S SPECIAL ELECTION EDITION IS A VIOLATION OF MCFL'S FREEDOMS OF SPEECH AND PRESS UNDER THE FIRST AMENDMENT.

A. MCFL's Special Election Edition Was Political Speech Entitled To Full First Amendment Protection.

Political speech, such as that engaged in by MCFL in the publication and distribution of its Special Election Edition in September 1978, is "at the core of the First Amendment." FEC v. National Conservative Political Action Committee (NCPAC), 105 S.Ct 1459, 1467 (1985). From the days of the founding of our country, it has been recognized that a free flow of political ideas is a cornerstone of our system of government. As Justice Brandeis stated in his concurrence in Whitney v. California, 274 U.S. 357 (1927):

> Those who won our independence believed . . . that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

Whitney v. California, 274 U.S. at 375 (Brandeis, J., concurring).

The main purpose of MCFL's publication is to put into the marketplace its views on an important and controversial political issue. Therefore, as political speech, it is entitled to the broadest First Amendment protection. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

The FEC argues that MCFL's corporate form justifies its intrusion on MCFL's members' First Amendment rights.

Although corporate form of organization might contribute to the establishment of a compelling government interest that might justify a restriction on the organization's freedom of speech, the fact that an organization is a corporation is not sufficient by itself to divest its political speech of First Amendment protection. As this Court stated in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978):

> [Political speech is] indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source, whether corporation, association, union, or individual.

Id. at 777 (footnotes omitted). The Court went on to say:

> We thus find no support in the First or Fourteenth Amendment, or in the

> decisions of this Court, for the proposition that speech that would otherwise be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . .

Id. at 784.

To deprive a group of its First Amendment protection based on its form of organization endangers the First Amendment right of freedom of association of its members. FEC v. NCPAC, 105 S.Ct. at 1467. The Court in NCPAC further said:

> To say that [the] collective action [of the PAC members] in pooling their resources to amplify their voices [in support of candidates] is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealtny to be able to buy expensive media ads with their own resources.

Id. at 1468.

This Court in NCPAC declined to decide the constitutionality of restrictions on independent expenditures

by corporations. FEC v. NCPAC, 105 S.Ct. at 1468. The Court did find, however, that a provision of the Presidential Election Campaign Fund Act limiting independent expenditures by a PAC in support of a particular candidate to $1000 violated the PAC's First Amendment rights because it furthered no compelling government interest. The same reasoning that the Court used in NCPAC leads to the conclusion that Section 441b of the Federal Election Campaign Act (FECA) is unconstitutional as applied to the Special Election Edition produced by MCFL, a non-profit idealogical corporation.

Like PAC's, non-profit idealogical corporations are "mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify the voices of

their adherents.'" FEC v. NCPAC, 105 S.Ct. at 1465, quoting Buckley v. Valeo, 424 U.S. at 22. The cost of mass communication today makes it impossible for any but the most wealthy to effectively communicate ideas on an issue by his or her own means. The members of MCFL have perceived the corporate form to be the most effective means to express their collective views, and they use it to achieve the greatest impact with their ideas.

In differentiating NCPAC's speech from the "proxy speech" found to exist in California Medical Assn. v. FEC, 453 U.S. 182, 196 (1981), the Court went on to say that "the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."

FEC v. NCPAC, 105 U.S. at 1468. That MCFL's contributors agreed with its message is equally obvious.

The "vote pro-life" message in MCFL's Special Election Edition was a form of candidate support fundamentally different from that engaged in by PAC's. It is meant to influence voters to support the pro-life stance. Any advocacy for a particular candidate is incidental, and contingent on his or her support of the pro-life goals of MCFL. MCFL's contributors expressly support its attempts to educate and influence the public on pro-life issues. There is no reason to believe that this support does not encompass dissemination of information on the positions of candidates for federal office on these issues. Nor is there a reason to believe that contributors would object

to the inevitable implied or express support for candidates who hold pro-life views.

The FEC contends that the decision of the court below that non-profit idealogical corporations are exempt on constitutional grounds from enforcement of FECA Section 441b cannot be reconciled with this Court's decision in FEC v. National Right to Work Committee (NRWC), 459 U.S. 197 (1982), which upheld a FECA provision that limited a corporation's solicitation of contributions for its political contribution fund to members of the corporation. Although it is true that the Court in NCPAC said that NRWC "turned on the special treatment historically afforded corporations," FEC v. NCPAC, 105 S.Ct. at 1468, that statement, when taken in context, in no way makes NRWC

inconsistent with the holding of the Court of Appeals in this case.

This Court's discussion in NCPAC of its holding in NRWC makes clear that although the decision did indeed turn on NRWC's corporate form, it did so only after the Court had determined NRWC's status with respect to another important distinction, which distinguishes it from this case. The restrictions upheld in NRWC applied to solicitation of funds for contributions to candidates, as opposed to the expenditures to publish views on a heavily debated political issue in this case, which were not coordinated with the candidates. The Court in NCPAC stated:

> NRWC is consistent with this Court's earlier holding [in First National Bank of Boston v. Bellotti, 435 U.S. at 789-790] that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional

> stature than corporate contributions to candidates.

FEC v. NCPAC, 105 S.Ct. at 1468. Expenditures not coordinated with a candidate are less likely to lead to actual or perceived corruption in an election than are contributions directly to a candidate.

B. Section 441b Is A Content-Based Prior Restraint On MCFL's Freedom Of Expression, And May Be Applied Only When Justified By A Showing Of A Compelling Government Interest.

Section 441b of the FECA was properly found by the Court of Appeals to be a prior restraint on political speech, considered to be the most drastic restraint on that First Amendment freedom. Near v. Minnesota, 283 U.S. 697, 713 (1931). Although such a statute is not unconstitutional per se, it is presumed to be, and the

government thus carries a heavy burden to justify such a restriction. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). Prior restraints are permitted only in exceptional cases, such as when speech is obscene, threatens military operations, or incites overthrow of the government. Near v. Minnesota, 283 U.S. at 716.

As the Court of Appeals noted, Section 441b does not affect the time, manner, or place of the political expression, but instead is based on its content. As this Court said in Police Department of Chicago v. Mosely, 408 U.S. 92, 98 (1972), "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and

wide-open.'" Id. at 96, quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

In this case, as in Bellotti, the speech that the government attempts to regulate is "intimately related to the process of governing," First National Bank of Boston v. Bellotti, 435 U.S. at 786, and therefore the government "may prevail only upon the showing of a subordinating interest which is compelling." Id., quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960). See also Pacific Gas and Electric Co. v. Public Utilities Commission of California, 54 U.S.L.W. 4149, 4154 (February 25, 1986).

The FEC's argument that Section 441b does not infringe on MCFL's First Amendment rights is not justified by the fact that alternative methods (such as

formation of a PAC) may be available to certain organizations seeking to produce the same speech. The administrative requirements for the formation and maintenance of a PAC could in many cases be sufficient to deter a small organization from forming the PAC, and thereby inhibit the organization's political speech.

As the Court of Appeals also correctly pointed out, the government's burden to justify the elimination of the simplest method is no less merely because an alternative, more burdensome means of producing the political speech is available. Cf. Linmark and Associates v. Willingboro, 431 U.S. 85, 93-94 (1977). In fact, given the well-recognized government interest in the maintenance of a "free flow of ideas," the First Amendment demands that

the simplest route to expression of political views be protected.

The FEC suggested that infringement on First Amendment freedoms should not decrease judicial deference to legislative judgment, quoting from a decision in which this Court stated that "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." Columbia Broadcasting System (CBS) v. Democratic National Committee, 412 U.S. 94, 103 (1973). The FEC omitted the following passage, which immediately follows the language quoted above:

> That is not to say we "defer" to the judgment of Congress and the [Federal Communications] Commission on a constitutional question, or that we would hesitate to invoke the

> Constitution should we determine that the Commission had not fulfilled its task with appropriate sensitivity to the interests in free expression.

Id. at 103. A quote taken out of context does not change the heavy burden on the government to justify a prior restraint, especially one on protected political expression.

C. The FEC Has Not Shown A Compelling Government Interest In Restricting MCFL's Speech Through Application Of FECA Section 441b To MCFL's Special Election Edition.

The only compelling government interest recognized by this Court for restriction of campaign finances and the free speech interests inherently involved is protection against corruption or the appearance of corruption. FEC v. NCPAC, 105 S.Ct. at 1469. These interests were among the purposes for Section 441b asserted by

the FEC in FEC v. NRWC, 459 U.S. 197, 207-208.

This corruption or appearance of corruption generally takes the form of actual or perceived political debts created through large campaign contributions. Buckley v. Valeo, 424 U.S. at 26-27.

As discussed above, this Court has previously held that a corporation's expenditures to promote its views are on a different constitutional footing than corporate contributions to candidates. First National Bank of Boston v. Bellotti, 435 U.S. at 789-790. As the Court recognized in Buckley, the FECA's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

Buckley v. Valeo, 424 U.S. at 23. The Court went on to explain:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that the expenditures will be given as a quid pro quo for improper commitments from the candidate.

Id. at 47.

Here, as in NCPAC, there was no coordination of the expenditures with any of the candidates, and no chance of any type of quid pro quo arrangement. And, in fact, any additional copies above the normal circulation of newsletter that might have been distributed could have been counterproductive had they reached the hands of voters who oppose MCFL's views.

As the Court said in NCPAC, "groups and associations. . . designed expressly to participate in political debate are quite different from traditional corporations organized for economic gain." FEC v. NCPAC, 105 S.Ct. at 1470.1/ A non-profit, idealogical corporation such as MCFL cannot create political "war chests" nor political debts through contributions. United States v. United Auto Workers, 352 U.S.

1/ Indeed, as Justice White wrote in Bellotti, "Undoubtedly, as this Court has recognized, see NAACP v. Button, 371 U.S. 415 (1963), there are some corporations formed for the express purpose of advancing certain idealogical causes shared by all their members . . . . Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations organized for the purpose of making a profit." First National Bank of Boston v. Bellotti, 435 U.S. at 805. (White, J., dissenting).

567, 579 (1957). Nor will an idealogical corporation wield disproportionate influence by means of money amassed through the advantages of corporate form. This type of corporation serves only to help express the views of its contributors more effectively and efficiently than the contributors could as individuals.

The FEC also asserted in NRWC, supra, that Section 441b is intended to protect the right of individuals who have paid money into a corporation to have their money used to support causes or candidates which they themselves do not support. This has not been previously recognized by this Court as a compelling government interest, but even if it were, it is clearly not present here, for, as previously noted, contributions to a corporation of this

type are predicated on support of its views. FEC v. NCPAC, 105 S.Ct. at 1468. The primary purpose of the Special Election Edition was to advocate a pro-life stance, and support of candidates was incidental.

The Court in NCPAC chose not to disturb the district court's finding that NCPAC's expenditures had caused no corruption because the finding was within that court's discretion. FEC v. NCPAC, 105 S.Ct. at 1470. In this case as well, the District Court correctly found that no corruption resulted from publication of the Special Election Edition. The same deference is thus fully justified.

As this Court has stated, when infringement of First Amendment freedoms is at issue, the standard of review is rigorous. FEC v. NCPAC, 105 S.Ct. at

1471. Although Section 441b's application to certain profit-making corporations may be justified, its applicability to MCFL's Special Election Edition, with no corresponding compelling government interest to justify it, makes it fatally overbroad, just as the statute limiting a PAC's independent expenditures in support of a candidate was invalidated for overbreadth in FEC v. NCPAC, 105 S.Ct. at 1470.

CONCLUSION

The FEC has attempted to contort the FECA's prohibition on corporate expenditures in .eral elections beyond its intended and allowable scope. The problems the statute was designed to alleviate -- specifically, corruption and the appearance of corruption -- are not implicated in the instant case.

The plain language of the statute, including its explicit exemption for legitimate news, makes it highly unlikely that Congress ever intended to prohibit publications such as MCFL's Special Election Edition. The primary purpose of the publication was to advocate a political view, and any advocacy of particular candidates was incidental. The expenditure could not possibly create the political debts

which Congress was trying to eliminate when it enacted the FECA.

If this Court should find that Congress did intend to prohibit this publication, the statute as applied by the FEC would be unconstitutional. A content-based prior restraint on MCFL's freedom of expression is presumptively unconstitutional. Only proof of a compelling government interest could justify such restrictions on the free expression of political idealogy. The FEC has not proven, nor is it possible for it to prove, a government interest sufficient to prevent publication by a non-profit idealogical corporation.

Accordingly, the decision of the Court of Appeals should be reversed as to the applicability of FECA Section 441b(a) to MCFL's Special Election

Edition, and affirmed as to its finding that the statute is unconstitutional as applied to that publication.

Respectfully submitted,

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